

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY OTIS TROTTER et al.,

Defendants and Appellants.

C055472

(Super. Ct. No.  
05F03192)

This case stems from a gang-related drive-by shooting. A jury convicted defendants Andy Otis Trotter and Roger Rernard Adams of two counts of attempted murder (Pen. Code §§ 664/187; unspecified section references that follow are to the Penal Code), discharging a firearm from a vehicle (§ 12034, subd. (c)), and shooting at an occupied vehicle (§ 246). The jury found charged gang and firearm enhancements to be true (§§ 186.22, subd. (b)(1); 12022.53, subd. (c)), and the court also found true a charged prior conviction allegation against defendant Adams. The court sentenced defendant Trotter to an aggregate prison term of 30 years to life plus 40 years, and

sentenced defendant Adams to an aggregate term of 60 years to life plus 50 years.

On appeal, defendants raise a variety of claims, each joining in the claims raised by the other. In addition to asking us to review the trial court's ruling on a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), they contend that (1) the court erred in making three evidentiary rulings, (2) there is insufficient evidence to support the gang enhancements, (3) their attorneys' failure to object to the prosecutor's questions and argument constitutes ineffective assistance of counsel, (4) the agreement not to have a reporter transcribe jury instructions precludes meaningful appellate review, and (5) the imposition of upper term prison sentences violates their right to a jury trial. None of these claims has merit, and we therefore affirm the judgment.

### FACTS AND PROCEEDINGS

Defendants are known members of the Nogales Gangster Crips, a gang that was embroiled in an ongoing war with the Elm Street Bloods. One night, defendants drove down Elm Street and fired shots at people who were outside a house known as an Elm Street Bloods hangout. One person was shot in the hand, and an occupied car was also hit. The victims could not identify their assailants.

Police were in the vicinity and apprehended defendants shortly after the shooting. Police also recovered weapons and ammunition that matched evidence found on the scene. Some of

this ammunition was recovered in the back of a patrol car immediately after defendant Adams was transported.

At trial, the prosecutor introduced forensic evidence as well as cell phone records. Witnesses included the victims, investigators, and a gang expert. We discuss relevant testimony in further detail later in this opinion.

The jury convicted defendants of all charges, and this appeal followed.

## DISCUSSION

### I

#### *Pitchess Motion*

Before trial began, defendant Adams sought to discover the personnel records of Officer Pamela Seyffert pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. Defendant Adams believed Officer Seyffert had lied in her report, and he wanted to determine if the officer had been involved in other incidents of false reports, fabrication of evidence, or fraud. After an in camera hearing, the court reported, "There are no records at all that pertain to any of those allegations. There are no records for me to order to produce to defendant with respect to Officer Seyffert."

Defendant Adams asks that we review the transcript from the hearing to determine whether the trial court erred. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1285.) The Attorney General agrees that this court may review the sealed record. We have

done so, and conclude that the trial court properly handled the matter. Its ruling was correct.

## II

### *Evidentiary Rulings*

Defendants challenge three of the trial court's evidentiary rulings: the exclusion of evidence relating to a victim's pending felony charges, the admission of another victim's statement, and the admission of a photograph of one of defendant Adams's tattoos. We discuss each claim in turn.

#### *A. Exclusion of Victim's Pending Felony Charges*

Defendant Adams sought to introduce evidence that D.B., the victim who was shot in the hand, had pending felony charges for making criminal threats and pimping. Defendant Adams asserted that this evidence was relevant to establish a possible nongang related motive for the shootings. The trial court found this evidence inadmissible under Evidence Code sections 1101 and 352.

On appeal, both defendants contend the court's ruling was erroneous. We disagree.

Initially, we question whether defendant Trotter is entitled to join in defendant Adams' argument. When this matter was discussed in the trial court, counsel for defendant Trotter stated, "I agree with the Court that [evidence that D.B. was a pimp] would seem to be character evidence. Under [Evidence Code] section 1101 it shouldn't be allowed." Defendant Trotter's concurrence with the trial court's assessment forfeits any claim of error on this point.

In any event, the trial court's ruling was well within its discretion. Even if defendants sought to introduce this evidence to demonstrate motive, a noncharacter purpose permissible under Evidence Code section 1101, the trial court acted well within its discretion in excluding the evidence under Evidence Code section 352.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The court's determination "'will not be overturned on appeal in the absence of a clear abuse of that discretion, upon a showing that the trial court's decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice.'" (*People v. Lamb* (2006) 136 Cal.App.4th 575, 582.)

Defendants assert that evidence of D.B.'s pending felony charges was relevant to suggest a nongang-related reason for the shooting. However, the pending charges arose in the fall of 2006, more than one year after the shootings at issue in this trial, and the probative value of this evidence was nonexistent: an event occurring after the shootings sheds no light on the reason for the shootings. Defendants would have to argue that if D.B. was charged with being a pimp who made criminal threats in the fall of 2006, he might have been engaging in the same conduct in August 2005. There is no evidence to support such a

theory. That link is, at best, highly speculative and borders on impermissible character evidence.

The trial court acted well within its discretion in concluding that this evidence would confuse the jury and that its potential for prejudice exceeded its probative value. Even if we were to conclude that the trial court misunderstood the reason for which the evidence was being offered, that error was harmless. Given the lack of probative value of the pending charges, the trial court would have been compelled to reach the same conclusion when weighing admissibility under Evidence Code section 352.

*B. Admissibility of Victim's Statement*

At trial, Officer Hoversten testified that on the night of the shooting, he had asked one of the victims, R.W., if he knew who had fired the shots. He said that R.W. replied that "it was probably the Nogales Crips because there had been a feud going on over the last few months between Nogales and Elm Street." The trial court instructed the jury that this statement was not offered for the truth of the matter asserted, but was admissible solely to help determine credibility issues.

Defendants contend that R.W.'s statement should have been excluded as irrelevant, speculative and lacking foundation. Even if we were to agree with these claims, defendants cannot demonstrate prejudice.

We presume that the jury followed the court's instructions and did not use R.W.'s statement in determining whether the

shooting was gang related. (*People v. Smith* (2007) 40 Cal.4th 483, 517.) Moreover, the prosecution's gang expert testified at length about the ongoing war between the Nogales Gangster Crips and Elm Street Bloods that had already resulted in four drive-by shootings in the same neighborhood in the preceding four months. Given this evidence, any error in admitting R.W.'s statement to Officer Hoversten was harmless.

*C. Photograph of Tattoo*

Defendants contend that the trial court erred in admitting a photograph of one of defendant Adams's tattoos because its prejudicial effect outweighed any probative value. We disagree.

The tattoo in question is located on defendant Adams's arm. It depicts a man, wearing a shirt marked "NC" and holding up a semiautomatic firearm; shell casings are coming out of the firearm.

Defendants sought to exclude the photograph of this tattoo because, according to defendants, it associated defendants with random violence and was overly prejudicial. The trial court rejected these concerns, ruling the tattoo was not "so inflammatory or over the top when considered with the rest of the tattoos that Mr. Adams has." The court ruled that the tattoo was relevant on the issues of intent, motive, and identity, and that its probative value outweighed any prejudicial effect.

Defendants contend that this ruling was erroneous because the photograph evoked "horror and revulsion," and should have been excluded. We disagree.

Evidence of gang tattoos is admissible if its probative value outweighs any potential for prejudice. (E.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 773; *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

The trial court here noted that this tattoo was "a message [defendant Adams] intended to send," and was highly probative on the issues of intent, motive and identity. Moreover, given that defendants sported other gang-related tattoos, this particular tattoo was not "over the top." The trial court concluded that the probative value of this particular photograph outweighed any potential for prejudice. That determination was well within its discretion. There was no error.

### III

#### *Sufficiency of the Evidence*

Section 186.22, subdivision (b)(1) provides for an enhanced prison sentence when a defendant commits a felony "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" For purposes of this statute, a "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of



[specified criminal activities], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

Defendants assert there is insufficient evidence to establish certain of these elements. Specifically, they contend that there was no substantial evidence that the Nogales Gangster Crips had as "one of its primary activities" the commission of the requisite offenses. They also assert that there was no substantial evidence that the shooting was committed "for the benefit of, at the direction of, or in association with" the Nogales Gangster Crips, or that it was intended "to promote, further, or assist in any criminal conduct by gang members." None of these claims has merit.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is

supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Defendants assert that there was insufficient evidence to establish that the Nogales Gangster Crips had one of the specified criminal acts as one of its "primary activities" and therefore the gang enhancements cannot stand. We disagree.

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

Defendants contend that the only evidence relied upon by the prosecutor to establish primary activities was the description of two murders that occurred in 2002 and 2004. That is not the case. In addition to describing those acts, the gang expert also testified that the Nogales Gangster Crips and Elm Street Bloods had been involved in a war between January 2005 and April 2005, when this shooting occurred. This feud was sparked by the homicide of a Nogales Gangster Crips member and led to four drive-by shootings in a four-month period in this neighborhood. This evidence was sufficient to meet the "primary activity" requirement.

Defendants next contend that there was insufficient evidence to establish that the shooting was done "for the benefit of, at the direction of, or in association with any criminal street gang." However, as defendants also recognize, courts have held otherwise in the identical circumstances.

"The crucial element . . . requires that the crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association* with a gang. Thus, the typical close case is one in which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 163; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332.)

We agree with that analysis. Here, defendants were both known members of the Nogales Gangster Crips and committed the drive-by shooting together, firing their weapons in front of a house known as the "secondary hang out for the Elm Street Bloods." Given the setting and the recent spate of shootings in this area, the jury could reasonably conclude that defendants acted in association with a criminal street gang. Defendants' claims to the contrary are not persuasive.

Finally, defendants contend that there was insufficient evidence to demonstrate that they intended "to promote, further, or assist in any criminal conduct by gang members." To the contrary. The gang expert testified that the Nogales Gangster Crips and Elm Street Bloods were feuding in this neighborhood; four other drive-by shootings had occurred in the preceding months. Defendants, known members of the Nogales Gangster Crips, committed this drive-by shooting in front of the house of a known member of the Elm Street Bloods. The gang expert testified that such a shooting, in the heart of enemy territory, was designed to demonstrate that the Nogales Gangster Crips were "not afraid to go into another rival's neighborhood to take care of what they intend[ed] to do or try to find someone or a target who they want to get. It shows that they have no fear of Elm Street."

There was ample evidence to support the jury's determination that defendants had the requisite intent to support the gang enhancement allegations.

#### IV

##### *Ineffective Assistance of Counsel*

Defendants assert their attorneys were ineffective in failing to object to remarks made by the prosecutor in his questioning of witnesses and in his arguments to the jury. The underlying predicate for defendants' claim is missing: their attorneys were under no obligation to object because no misconduct occurred.

"To secure reversal of a conviction for ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that, to a reasonable probability, defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068.)

At the preliminary hearing, three of the prosecution's witnesses (including the two victims) testified that they knew B.B., a member of the Elm Street Bloods, and that the shooting occurred near B.B.'s house. One of the witnesses described this area as a Blood gang area. However, when these witnesses testified at trial, they denied knowing B.B. or where he lived, and also denied knowing whether the shooting occurred in a Blood or Crips area. The prosecutor asked these witnesses if they were afraid of testifying and asked about the consequences of being labeled a snitch.

The prosecutor's gang expert testified that gang members instill fear in area residents, which results in difficulties in investigating gang-related crimes. Witnesses do not want to be labeled as "snitches" and are therefore reluctant to talk to police, obey a subpoena, or testify.

In his argument to the jury, the prosecutor stated that this testimony explained the behavior of the testifying witnesses and why D.B. "maybe didn't act the way that you would expect somebody who got shot for no reason to act when they come to court. [¶] They got to go back to where they live. They

know what's happening. They know what's going on. They know the code."

The prosecutor contrasted gang cases with others in which witnesses appear in court willingly and describe what happened. He stated, "They may or may not be able to identify the person who did it. And they'll tell us. And it's clear that they're doing the best that they can to help everybody out in simply getting whatever information that's in their head out into evidence from the witness stand. [¶] Not gang cases. The moment the police show up it's a completely different world. And when it hits the Court system and finally we get a jury picked and finally we get these people to court, this is what we get. Doesn't matter. Doesn't mean these crimes didn't happen."

Defendants contend that the prosecutor's questioning of witnesses and statements in closing argument amounted to unsworn testimony and was therefore improper. They assert that the failure of their attorneys to object to these remarks constituted ineffective assistance of counsel. There was no misconduct.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments

made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

The questions posed to the witnesses did not involve any unfairness or deceptive practices. The prosecutor was entitled to ask the witnesses about their change of testimony, and these questions were well within the proper scope of that inquiry.

"At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom." (*People v. Morales, supra*, 25 Cal.4th at p. 44.) However, a prosecutor may not refer to facts not in evidence and suggest facts exist that are unsupported by the record. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828.)

The prosecutor's comments to the jury were appropriate remarks given the gang expert's testimony, the victims' inconsistent testimony, and the victims' behavior in court. Contrary to defendants' claims, the prosecutor's statements did not constitute unsworn testimony. They were simply comments on the evidence and focused on the appropriate inferences that could be drawn. There is no likelihood that the jury misconstrued the prosecutor's comments in any improper manner. (See *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 513-514.)

Because there was no misconduct, defendants' attorneys had no reason to object, and defendants' claims of ineffective assistance of counsel necessarily fail.

## V

### *Failure to Transcribe Jury Instruction*

Defendants contend that they were denied the right to meaningful appellate review when the trial court asked for, and received, a stipulation from defense attorneys that the court reporter did not need to transcribe the court's oral jury instruction. Defendants' claim is meritless.

At the conclusion of oral argument, the court asked, "Counsel, you waive the court reporter's reporting the Court's reading of the jury instructions provided the copy is made as part of the court records in this case?" Both counsel responded affirmatively.

The court read the instructions to the jury, and then asked, "Counsel, are you satisfied [with] the Court's reading of the jury instructions?" Again, both attorneys responded, "Yes."

We recently urged courts to record its oral instructions to the jury in order to avoid any subsequent controversy over the accuracy of the proceedings. (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 494.) However, the absence of such a transcript does not necessarily violate due process.

In *People v. Garrison* (1989) 47 Cal.3d 746, 780-781, the court stated: "We reject defendant's contention that the failure to report the reading of the instructions denied him due



process. The parties stipulated that the court reporter might be excused from reporting the reading of the jury instructions. In light of counsel's stipulation and defendant's failure to suggest that there was any deviation in the reading from the typed copies contained in the record, we find no violation of due process."

Here, the parties stipulated that the reporter did not have to transcribe the instructions. After the reading, they confirmed, for the record, that the court accurately read the written instructions. They make no suggestion on appeal that that was not the case. Under these circumstances, meaningful appellate review is in fact possible: the parties agreed that the written instructions, contained in the record, accurately reflected the nontranscribed oral instructions given to the jury. Defendants' claim to the contrary is meritless.

## VI

### *Imposition of Upper Term*

Defendants assert that the trial court erred in imposing upper term sentences because a jury did not determine the aggravating facts. There was no error.

The trial court sentenced defendant Trotter to the upper term on counts three and four, discharging a firearm from a vehicle and shooting at an occupied vehicle. The court explained: "This court imposes the upper term because of the various prior convictions not alleged in this Information

against the Defendant. He was also on parole when the current offense was committed."

The trial court also sentenced defendant Adams to the upper term on both of these offenses, based on defendant's "extensive criminal history."

A court may rely on prior convictions and prison terms in imposing the upper term, without submitting those factors to the jury. (*People v. Black* (2007) 41 Cal.4th 799, 818.) Although defendants challenge *Black's* analysis, we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) There was no error in sentencing.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
HULL, J.

We concur:

\_\_\_\_\_  
SIMS, Acting P. J.

\_\_\_\_\_  
BUTZ, J.